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No. 85-658

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID MORGANSTERN AND FRED MORGANSTERN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that they may resist a subpoena for corporate and partnership documents on the ground that the act of producing the documents would incriminate them.

1. On January 11, 1984, attorney Shelby C. Kinkead, Jr. was served with a grand jury subpoena requiring him to produce the records of partnerships and corporations controlled by petitioners. Petitioners unsuccessfully moved to quash the subpoena on Fifth Amendment and other grounds. A panel of the Sixth Circuit reversed, holding that the act of producing the subpoenaed documents was protected by the Fifth Amendment privilege because it would involve a risk to petitioners of substantial testimonial self-incrimination from which they had not been immunized.

Thereafter, the court of appeals, sitting en banc, vacated the panel decision and affirmed the judgment of the district court (Pet. App. 1a-16a).

In affirming the denial of the motion to quash, the en banc court of appeals relied on a long line of decisions of this Court, including *Bellis* v. *United States*, 417 U.S. 85 (1974), that holds that the books and records of a collective entity such as a partnership or corporation cannot be insulated by a claim of personal privilege on the part of their custodian (Pet. App. 3a-6a). The court rejected the argument that *United States* v. *Doe*, 465 U.S. 605 (1984), "extended to the custodian of corporate and partnership records the same right to refuse to produce those records as an individual has with respect to personal records" (Pet. App. 8a). The court explained that, although *Doe* recognized that the production of business records by a sole proprietor may be a testimonial act protected by the Fifth Amendment (*id.* at 9a-10a), it did not involve a subpoena for corporate or partnership records and therefore did not "support[ ] an inference that the collective entity rule, developed by [this] Court over a period of nearly 80 years, was overruled *sub silentio*" (*id.* at 10a).

2. Petitioners contend that the subpoenas at issue here should be quashed because the act of producing the requested documents would incriminate them. This Court has repeatedly held that the "books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian." *Curcio* v. *United States*, 354 U.S. 118, 122 (1957). See also, *e.g.*, *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976); *Bellis* v. *United States*, 417 U.S. at 88; *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911). Nothing in

Doe purports to overrule these cases. Following *Doe,* however, the circuits have rendered inconsistent opinions regarding this question. Several circuits, including the court of appeals in this case, have reaffirmed the traditional rule. *In re Grand Jury Subpoena (Lincoln),* 767 F.2d 1130 (5th Cir. 1985); *United States* v. *Malis,* 737 F.2d 1511 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas),* 727 F.2d 941 (10th Cir. 1984), cert. denied, No. 83-1756 (Oct. 1, 1984). The Third Circuit has held that a corporate custodian may insist upon receiving act-of-production immunity. *In re Grand Jury Empanelled 3-23-1983 (Katz),* No. 85-5018 (Sept. 23, 1985); *In re Grand Jury Matter (Brown),* 768 F.2d 525 (1985) (en banc). The Second Circuit has held that the Fifth Amendment provides no ground for resisting a subpoena for corporate documents if the corporation is permitted to choose the agent who makes production. *In re Two Grand Jury Subpoenae Duces Tecum,* 769 F.2d 52 (1985). This allows the corporation to find an officer or employee or to appoint an outside agent willing to produce the documents without claiming the Fifth Amendment privilege.

While the decisions of the courts of appeals exhibit considerable disagreement regarding the governing legal rules in this area, it is not clear that any circuit would reach a result different from that of the Sixth Circuit in the present case. Here, the subpoena was not directed to a corporate officer but to an attorney who apparently handled the corporations' legal affairs. The attorney did not claim that the act of production would incriminate him personally. Thus, the attorney was apparently just the sort of agent that the corporation would be required to find to make production under the Second Circuit approach. And the Third Circuit has indicated that it might find that approach acceptable. See *Rogers Transportation, Inc.* v. *Stern,* 763 F.2d 165 (1985).

In any event, even if there were a true conflict, there would be no occasion to resolve it here because, following the denial of petitioners' request for a stay pending appeal,[1] petitioners' attorney turned all the subpoenaed documents over to the government. Accordingly, petitioners' motion to quash the subpoena is moot. If petitioners are indicted and the government seeks to use their attorney's act of producing the subpoenaed documents against them, petitioners may move to suppress that evidence. If the district court denies the suppression motion, petitioners are convicted, and the court of appeals upholds their convictions, they may seek review by this Court of the question posed by their present petition. At the present time, however, the issue of whether the act of producing the subpoenaed documents may properly be used against petitioners is not yet ripe for review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1985

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[1]We argued in the court of appeals that the case was moot (see U.S. Supp. Br. 4-5), but the court of appeals did not rule on the issue of mootness, and petitioners have not raised that issue in this Court.

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